B. The Commission should Commence a Separate Proceeding to Design and Implement Universal Service Auctions

AirTouch supports the use of market-based incentives, including auctions. There are many issues that must be addressed in setting up such auctions to ensure that they serve the public interest rather than enrich incumbent local exchange providers. While AirTouch is confident that the Commission has the demonstrated expertise to run auctions successfully, it believes that these issues are sufficiently complex that they should be addressed in a separate proceeding. AirTouch limits its comments here to a broad overview of some of the major issues that must be addressed.

The Commission will likely need to conduct simultaneous multi-round auctions for service areas so that bidders can aggregate adjacent territories and thus achieve economies of scale and scope.

Ideally, competition for subsidy revenues would drive these amounts down to the minimal levels necessary to achieve policy objectives. However, regulatory eligibility requirements, as well as technological and commercial considerations, may result in there being too few bidders to support vigorous competition in many areas. In order to ensure that subsidy payments are not excessive, the Commission should set payment ceilings based on information generated by proxy models.

Moreover, to the extent that there are areas of intense bidding competition, the winning bids from those auctions can provide useful information for capping subsidy amounts. Information from these auctions could be used to calibrate and cross-check the proxy models. The proxy models, in turn, could be used to make adjustments to the winning

bids from competitive auctions so that these bids could be used to set payment ceilings in uncompetitive areas. For example, a proxy model might indicate that costs are $5.00 per month higher in a particular area in which there is no competition than in the most comparable area subject to competitive bidding. The amount of the subsidy for the uncompetitive area might then be set at the level of the winning bid in the competitive area plus $5.00 per month.

There is little reason to expect predatory pricing behavior by large companies. It is doubtful that large companies will accept excessively low universal service support levels in order to drive out competition, and policy makers should therefore reject any attempt to discourage aggressive bidding for universal service support funds. The central goal of competitive bidding is to reduce support levels needed to attain a given level of service by encouraging firms to bid prices down to the underlying service costs and to engage in innovation to reduce these costs. Floors on support levels would undermine the competitive process and the benefits it can bring.

Problems might arise if firms underbid and were then allowed to renegotiate their support levels after the competitive bidding process has ended. Just as the Commission requires the high bidders in spectrum auctions to honor their bids, the Commission should make it clear that companies will have to honor their commitments in universal service auctions.

A similar issue arises with respect to service quality. The service quality level must be part of the process, and the Commission must establish target quality levels and work with the states to police winning bidders' compliance. One approach is for policy makers to

specify a quality level in advance and have firms then bid to provide the specified level of service at least cost. Another approach is to let service providers submit multidimensional bids, stating both the price and the service quality that they are offering. This second approach requires some means of scoring the tradeoff between price and quality so that one could choose, for example, between two bids where one had a higher price and higher quality than the other.[40] In order to facilitate multiple rounds of bidding in an open process, the scoring system would have to be well defined and publicly known.

VII. THE PUBLIC HAS THE RIGHT TO KNOW WHAT IT IS PAYING AND HOW THE TAX REVENUES ARE BEING SPENT

Principles of governmental accountability demand that the public have the right to know what they are paying in universal service taxes. Two broad policy conclusions follow from the principles of accountability:

- Universal service charges should appear as separate lines on subscriber bills, with a clear explanation of what they are.

- Universal service taxes should not be hidden in charges (such as the CCLC) that are levied on carriers purchasing services from the ILECs, but ultimately are borne by telecommunications consumers.

The same principles of governmental accountability contradict any suggestion in the *RD* that telecommunications carriers will not be able to recover the costs of their universal service contributions from their customers.[41] As Commissioner Chong aptly points out:

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40 This may unnecessarily increase the complexity of the auction.

41 In that regard, AirTouch assumes that the statement in the *RD* that an SLC increase or an end-user surcharge would "violate the statutory requirement that carriers, not consumers, finance support mechanisms," (*RD* at ¶ 812) is not construed to prohibit (continued...)

Let us make no mistake about who will foot the bill for this universal service program. It is not the telecommunications carriers, but the users of telecommunications services to whom these costs will be passed through in a competitive market place.[42]

VIII. STATE AND FEDERAL UNIVERSAL SERVICE POLICIES MUST AVOID DUPLICATION AND INCONSISTENCY

A. Federal and State Universal Service Taxes Should be Coordinated to Avoid Inefficient, Overly Burdensome and Discriminatory Taxation

The *RD* recommends assessing contributions for schools and library support programs based upon both interstate and intrastate revenue.[43] The *RD* also recommends that the Commission should consider assessing contributions for rural, insular, and high cost area support based upon interstate and intrastate revenue.[44] The *RD*, however, gives no consideration for coordinating the federal and state universal service benefits programs and the taxes that will support such programs. As a consequence, the *RD*'s recommendations may result in an improper and economically detrimental double-taxation of telecommunications carriers. In essence, the same revenue would be subject to taxation by both the federal and state governments for substantially the same purpose.

AirTouch submits that assessing both interstate and intrastate revenues is reasonable only if the Commission coordinates the taxation mechanisms supporting interstate and

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41 (...continued)
carriers from recovering universal service contribution costs.

42 Chong Separate Statement at 14 (emphasis in original).

43 *RD* at ¶ 817.

44 *Id.* at ¶ 821.

intrastate universal service policies. Indeed, throughout this proceeding, AirTouch has argued that intrastate and interstate universal service policies must be coordinated in order to avoid: (1) enabling the LECs to continue to reap the benefits of large, implicit cross-subsidies; and (2) improper double taxation upon telecommunications carriers.[45] Moreover, Section 254(f) mandates that state universal service programs must be consistent with "the Commission's rules to preserve and advance universal service" and such state regulation cannot "rely on or burden *Federal* universal support mechanisms."[46]

In the absence of significant coordination between federal and state universal service benefits and taxation, the double taxation contemplated by the *RD* will have a substantial adverse impact upon the economic efficiency of the universal service programs and, by extension, upon consumers of telecommunications services. The efficiency costs, or deadweight loss, from taxation for universal service increase more than proportionately with an increase in the cumulative tax rates.[47] The potential interaction of federal and state universal service taxation can be demonstrated with a simple example. Assume that the states were free to levy taxes on the intrastate and interstate revenues of interstate telecommunications service providers, and levied taxes equal to five percent of net revenues. Assume further that the federal government levied taxes equal to ten percent of net revenues. As demonstrated in the following chart, in this example state universal service taxation

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45 *See* AirTouch Comments at 2-5; AirTouch Reply Comments at 17-19.

46 *Id.*

47 This can be seen by from the deadweight loss formula derived in the appendix, where it is shown that the size of the deadweight loss triangle is proportional to the square of the tax rate.

increases the deadweight loss by almost sixty percent, although the state tax is fifty percent of the federal tax:

Sample Welfare Losses from State and Federal Taxation

Federal Tax Rate	.10	.10
State Tax Rate	.0	.05
Elasticity	.72	.72
Lerner Index	.4	.4
Deadweight Loss (billions per year)	$3.160	$5.004

The coordination of federal and state universal service benefits and taxation is also necessary because there appears to be a growing effort at the state level to capture a significant portion of telecommunications carriers' revenues for universal service purposes. Kansas, for instance, is considering imposing a 14% tax upon wireless carriers' telecommunications revenues.[48] In addition, California has established a 7% tax upon all telecommunications revenues.[49] As a result, carriers face a substantial risk of being overtaxed and otherwise caught between two different universal service programs, if the state and federal universal service efforts are not coordinated in some manner.

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48 *See Kanasas Public Utility Commission*, Docket No. 190,492-U, Staff Recommendation (October 9, 1996).

49 *California Public Utility Commission*, Decision No. 96-10-066 (adopted October 25, 1996).

To that end, if the Commission elects to assess universal service charges based upon both interstate and intrastate revenues, AirTouch urges the Commission to coordinate the federal and state taxation methods. AirTouch believes that such coordination can best be achieved through offset mechanisms. Specifically, telecommunications carriers should be permitted to deduct from their federal universal service contributions the amount of any state-levied universal service tax. In addition, federal universal service support payments to states that assess a universal service tax upon telecommunications carriers should be reduced by the amount of that tax. This offset on expenditures is necessary to eliminate any incentive a state may have to overtax carriers in order to capture the benefit of the offset for contributions to federal universal service programs.

It is important to note, however, that Commercial Mobile Radio Service ("CMRS") providers are not likely to benefit significantly from the recommended federal/state universal service coordination. As discussed below, pursuant to Section 332(c)(3) of the Act, CMRS providers are not subject to state universal service programs.

B. CMRS Providers are Subject Solely to Federal Universal Service Support Obligations

The *RD* concludes, without analysis, that Section 332(c)(3) of the Act "does not preclude states from requiring CMRS providers to contribute to sate support mechanisms."[50] This conclusion directly contradicts the language and intent of both Section 332 and the universal service provisions of the 1996 Act, and should not be adopted by the Commission.

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50 *RD* at ¶ 791.

Instead, Section 332 and the 1996 Act mandate that the universal service support obligations of CMRS providers is to be addressed at the federal level, and not at the state level.

To start, Section 254 of the 1996 Act draws a clear distinction between the interstate and intrastate universal service obligations of telecommunications carriers. Specifically, carriers providing "*interstate* telecommunications services" are required to contribute to federal "mechanisms established by the Commission to preserve and advance universal service."[51] By contrast, carriers providing "*intrastate* telecommunications services" are required to contribute to state-"determined" support mechanisms in furtherance of state universal service objectives.[52] Moreover, the state's authority in this area is constrained by the federal scheme. Thus, a state may adopt universal service regulations *only* if such regulations are "not inconsistent with the Commission's rules to preserve and advance universal service" and such state regulation cannot "rely on or burden *Federal* universal support mechanisms." [53]

This distinction between interstate and intrastate universal service obligations is critically important to AirTouch and other CMRS providers. CMRS is inherently and jurisdictionally a wholly *interstate* service and, as such, is subject only to *federal* universal service requirements and funding mechanisms. This federal treatment of CMRS for universal service and other purposes is mandated by Section 332(c) of the Act.

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51 47 U.S.C. § 254(d) (emphasis added).

52 47 U.S.C. § 254(f) (emphasis added).

53 *Id.*

In 1993, Congress enacted the Budget Act[54] which, *inter alia*, adopted a new Section 332(c), establishing a "*Federal regulatory framework* governing the offering of all commercial mobile services."[55] Duplicative and burdensome state regulation threatened the competitive development of the CMRS market. Therefore, a comprehensive federal regulatory scheme was deemed necessary to foster "growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[56]

To facilitate these important federal polices, Section 332(c) was amended to preempt state jurisdiction over CMRS rate and entry.[57] States are permitted to petition the Commission for authority to regulate CMRS providers, but only in limited circumstances — when CMRS becomes a "substantial substitute" for land line service and other standards are met.[58]

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54 Omnibus Budget and Reconciliation Act of 1993 ("Budget Act"), § 6002, 107 Stat. 312 (1993); 47 U.S.C. § 332(c) (as amended).

55 H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess., 490 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 1179.

56 H.R. Rep. No. 111, 103d Cong., 1st Sess., at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

57 *See* 47 U.S.C. § 332(c) (as amended).

58 47 U.S.C. § 332(c)(3). The States carry a high burden of proof to successfully prosecute these petitions. *See Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7493 (1995). Indeed, Congress advised the Commission that, in reviewing the petitions, it must "be mindful of the Committee's desire to give the policies embodie[d] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice." 1993 U.S.C.C.A.N. at 588-89.

Similarly, this "substantial substitute" standard and language expressly limits state jurisdiction over CMRS for purposes of implementing universal service obligations. Thus, Section 332(c)(3) provides in pertinent part:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State*) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[59]

CMRS is *not* currently a landline service substitute for a substantial portion of the communications in any state[60] and the *RD* would improperly read the parenthetical language out of Section 332 by subjecting CMRS carriers to state universal service taxes.[61]

In sum, the Budget Act clearly articulates a Congressional policy of placing regulation of the CMRS industry, including regulation for universal service purposes, in the hands of the FCC unless and until CMRS becomes a land line service substitute for a substantial portion of the communications in any state. In turn, the 1996 Act expressly preserves this fundamental policy. Indeed, the 1996 Act expressly preserves the preemption provisions contained in Section 332(c)(3) of the Budget Act. For example, Section 253(e)

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59 47 U.S.C. § 332(c)(3) (emphasis supplied).

60 The Commission concluded in its Annual Report to Congress, CMRS is not yet competitive with wireline telephone service. *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 F.C.C.R. 8844, 8869 (1995).

61 It is a cardinal rule of statutory construction that effect should be accorded to every part of a statute. *See, e.g., U.S. Nat. Bank of Oregon v. Independent Ins. Agents*, ___ U.S. ___, 113 S.Ct. 2173, 2182 (1993)(stating "Statutory construction 'is a holistic endeavor,' . . . and at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." (citations omitted)).

states that "[n]othing in this section shall affect the application of 332(c)(3) for commercial mobile providers." [62] Similarly, Section 601(c)(1) of the 1996 Act provides that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided."[63] Therefore, Section 254 does not modify or supercede Section 332(c) because it does not do so "expressly." Finally, AirTouch notes that Section 254 permits states to exercise universal service jurisdiction only with regard to carriers providing "*intrastate* telecommunications services." Therefore, AirTouch submits that, under Sections 332(c)(3) and 254, states are prohibited by law from imposing intrastate universal service requirements on CMRS providers.[64]

IX. CONCLUSION

Ill-conceived and poorly implemented universal service policy has the potential to do as much harm as good. The laws of economics are not suspended by good intentions. While the Joint Board has made a significant contribution to the policy discussion, key

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62 47 U.S.C. § 253(e).

63 110 Stat. 143.

64 AirTouch notes that, without addressing the impact of the 1996 Act, a recent decision of the Superior Court of Connecticut, Judicial District of Hartford-New Britain at Hartford, held that "the Budget Act preempts" the Connecticut Department of Public Utility Control from assessing CMRS providers "for payments to the Universal Service and Lifeline Programs." *Metro Mobile CTS of Fairfield County, Inc., etc. v. Conn. Dep. of Public Utility Control*, __ Conn. Super. Ct. __, *slip op.* 7-8 (December 9, 1996).

aspects of its recommended decision are fundamentally unsound and should not be adopted by the Commission.

Respectfully submitted,

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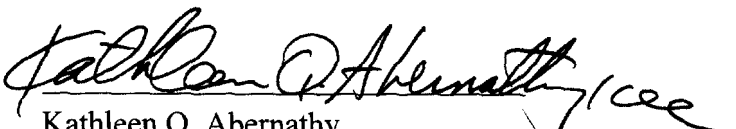
By: 

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APPENDIX

This appendix derives the formula used to calculate the deadweight loss of a tax, such as one levied on telecommunications services to fund universal service programs.[1]

Let c denote the marginal cost of service, let p denote the current price of service, and let t denote the tax rate. As shown in the figure, imposition of the tax lowers the quantity from $Q+\Delta Q$ down to Q.

The deadweight loss of taxation arises because the tax discourages consumers from purchasing units of service that would generate benefits greater than their costs of production. The dollar benefits generated by a unit of service are given by the height of the demand curve. The marginal costs of a unit of service are given by the height of the marginal cost curve. Thus, the efficiency loss is equal to area between the marginal cost curve and the demand curve over the interval Q to $Q+\Delta Q$. This is the shaded area in the figure.

The shaded area can be broken down into a triangle and a rectangle. The sum of their areas can be expressed algebraically as

$$\text{DWL} = \tfrac{1}{2}tp\Delta Q + (p-c)\,\Delta Q.$$

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[1] For a greater discussion of this derivation, see Alan J. Auerbach, "The Theory of Excess Burden and Optimal Taxation," in *Handbook of Public Economics, Vol. I.* A.J. Auerbach and M. Feldstein, eds. Amsterdam: Elsevier Science Publishers B.V. (North-Holland), 1985, pages 68 and 70 in particular.

By definition, the price elasticity of demand is $\eta = (\Delta Q/Q)/(\Delta p/p)$.

Rearranging terms, this implies that $\Delta Q = \eta(\Delta p/p)Q$. Substituting this expression for ΔQ into the expression for deadweight loss yields

$$\text{DWL} = \{\tfrac{1}{2}tp + (p-c)\}\ \eta(\Delta p/p)Q.$$

The price change is equal to the per-unit amount of the tax, or $\Delta p = t \times p$. Thus, the deadweight loss is given by

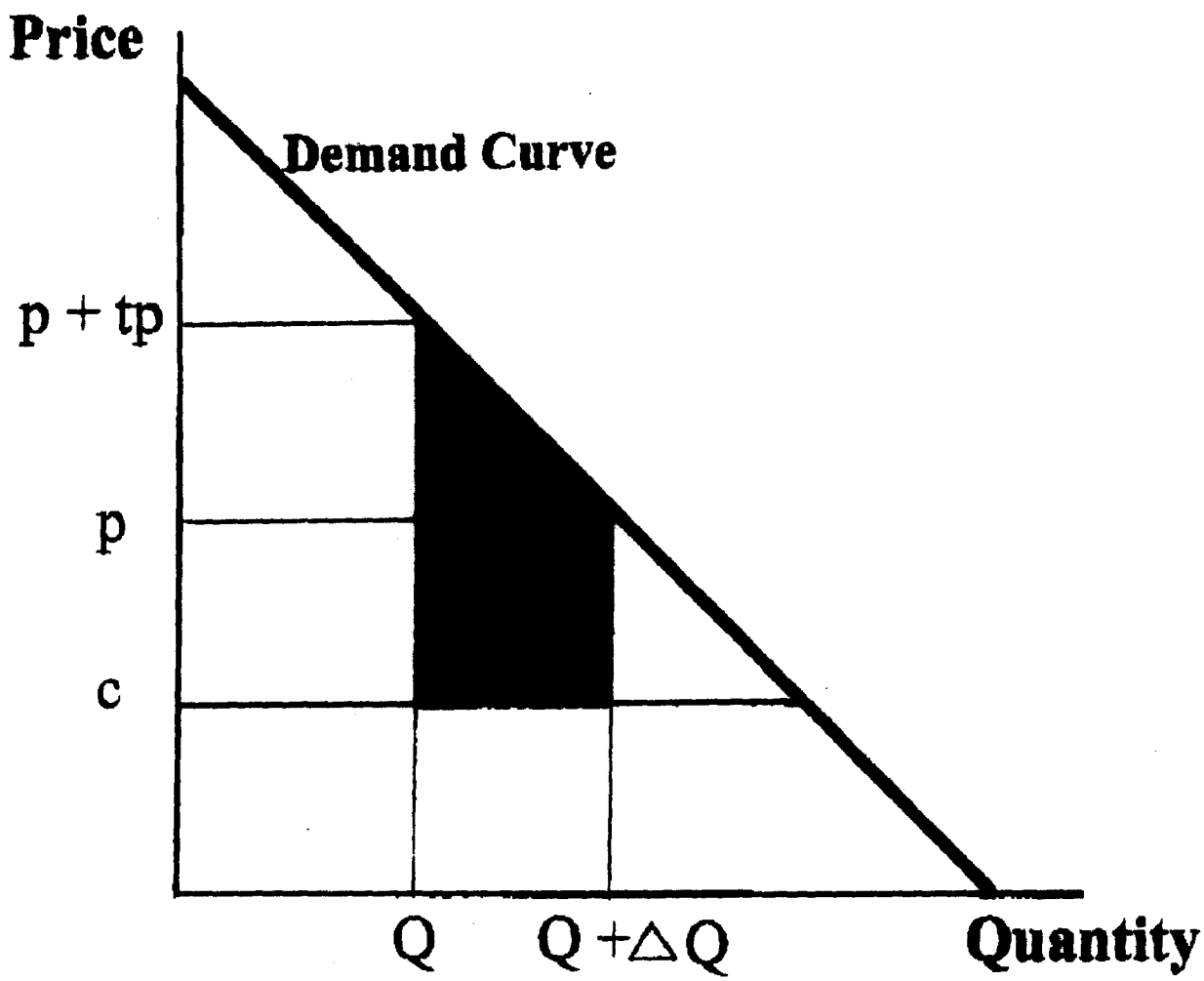
$$\text{DWL} = \{\tfrac{1}{2}tp + (p-c)\}\ \eta tQ,$$

which in turn can be rewritten as

$$\text{DWL} = \{\tfrac{1}{2}t + L\}\ \eta tR,$$

where $L = (p-c)/p$ is the Lerner index and $R = p \times Q$ is service revenue.

Deadweight Loss from a Tax



CERTIFICATE OF SERVICE

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